LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 18 1967
JOHN F. DAVIS, CLERK

No. 511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA,
Petitioner,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

RECEIVED
SEP 18 1967
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES A. HORSKY
701 Union Trust Building
Washington, D. C. 20005

L. P. McLENDON, JR.
440 West Market Street
Greensboro, North Carolina

INDEX

	Page
Opinions Below	1
Questions Presented	2
Statement	2
Reasons for Denying the Writ	7
Conclusion	9

AUTHORITIES

Cases:

Gunther v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257 .. 8

Transportation-Communication Employees Union v. *Union Pacific R.R.*, 385 U.S. 157 .....2, 3, 7 *et seq.*

Statute:

Railway Labor Act, 45 U.S.C., § 153 First (j) .....3, 4, n. 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 511

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA,
Petitioner,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, and the subsequent opinion on Petition for Rehearing, which have not been reported to date, are printed at pages 18-34, and page 35, respectively, of the Appendix to the Petition. The opinions of the

United States District Court for the Middle District of North Carolina are reported at 254 F. Supp. 564 and 254 F. Supp. 569.

QUESTIONS PRESENTED

Did the court below err in remanding two disputes to the National Railroad Adjustment Board for further consideration in the light of the subsequent decision of this Court in *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, where:

(1) in the first case a "response" (which does not appear in the record) was filed by a competing union in a dispute between petitioner and respondent over a work assignment, but where the record does not clearly show that the Board considered the competing union's contract or possible claim.

(2) in the second case another union, which may have a claim to the work, was not notified of the dispute between petitioner and respondent over the assignment of the installation of electrical transmission line poles to an outside contractor;

STATEMENT

This controversy stems from the proceedings on two separate claims made by the Brotherhood of Railroad Signalmen on behalf of several of its members against the Southern Railway Company. The awards of the Railroad Adjustment Board, Third Division, were reviewed consecutively by the District Court. The decisions of that court were reviewed concurrently by the Court of Appeals which ordered that both claims be remanded to the Board for reconsideration

in light of *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157.

1. *The Spartanburg claim.* In early 1956, Southern installed an electricial "car-retarder system" to hold cars in place on the tracks adjacent to the repair facilities at its Hayne Car Shop yard in the suburbs of Spartanburg, South Carolina. Maintenance of this system was assigned to car shop employees, members of a Shop Craft employees union. On learning of this maintenance assignment, petition filed a claim with respondent on behalf of the two signalmen employed at or near Spartanburg asserting that the signalmen were entitled to perform the work of maintaining the car-retarder system and that respondent had violated the signalmen's collective bargaining agreement by permitting employees other than signalmen to perform such maintenance. The resultant dispute was eventually submitted to the National Railroad Adjustment Board, Third Division. In support of its claim, petitioner relied on the language of the "Scope Rule" in its contract to the effect that "[S]ignal work shall include . . . generally recognized work on . . . car-retarder systems . . ." (Pet. p. 20). Respondent on the other hand, contended that the contractual phrase "generally recognized signal work" referred only to the more elaborate mechanisms used in classification yards and not to the limited equipment installed within the Car Shop yard limits. In addition, respondent pointed out that since the requested assignment of the maintenance work to the signalmen would displace Shop Craft employees, the Shop Craft employees union was "involved" in the dispute within the meaning of Section 3 First (j) of the Railway Labor Act, 45 U.S.C. § 153 First (j) and thus a prerequisite to the exercise

of the Board's jurisdiction was formal notification to the Shop Craft employees union of the Board's proceedings (Pet. p. 20).[1]

The Board's decision in favor of petitioner notes that the "[S]cope Rule contains no language limiting or restricting 'car-retarder system' with respect to their size, their location, or the purpose for which they must or may be used" (R. Appendix III, p. 3a). Consequently, the Board concluded, the maintenance of the car-retarder system was "generally accepted signal work" on "car-retarder systems" within the meaning of the Scope Rule of the Signalmen's collective bargaining agreement (*Ibid.*). "We have also concluded," the Board's opinion continues, "that the Shop Craft employees who have been permitted to maintain said 'system' since its installation are not necessarily parties to the dispute. The organization to which they belong was notified of the pendency of the dispute and filed its response thereto. Therefore, the question as to the necessity for giving notice is moot" (*Ibid.*). The Board's award requires respondent to compensate the two Spartanburg signalmen for work performed by the Shop Craft employees on the car-retarders at the Hayne Car Shop since October 18, 1956,[2] and to assign the disputed maintenance work to the signalmen (R. Appendix III, p. 4a).

2. *The High Point Claim.* On June 28, 1957, respondent's Signal and Electrical Department learned

---

[1] Section 3 First (j) of the Railway Labor Act, 45 U.S.C. § 153 First (j), requires the Adjustment Board to "give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them."

[2] In the course of the subsequent enforcement proceeding, the parties stipulated that the amount in controversy totaled $92.79 (Pet. p. 20, n.1).

that construction of a new spur track in the High Point, N. C., area was to begin on July 1, with the consequence that nearby transmission lines would have to be elevated promptly The emergency assignment of the installation of three longer transmission line poles to the L. W. Routh Construction Co. resulted in petitioner's claim that the work performed by construction company personnel in installing the transmission poles on July 1 should have been performed by signalmen in accordance with the "Scope Rule" of the Signalmen's agreement. In the course of the resultant proceedings before the Railroad Adjustment Board, Third Division, in which petitioner sought payment to signalmen for the work performed by the outside construction workers, respondent contended that the Scope Rule of the Signalmen's agreement did not prohibit it from assigning the work of installation of transmission poles to personnel other than signalmen; in support of this contention, respondent pointed out that Rule 137 of the International Brotherhood of Electrical Workers Agreement specifically defines linesmen's work as consisting "of the building, repairing and maintaining of pole lines and supports for service wires and cables . . . ,"[3] and that electricians operating under this I.B.E.W. contract, had worked on transmission line poles in the past (R. Appendix I, pp. 1a-4a).

In its opinion sustaining petitioner's claim, the Board wrote: "These arguments, in our estimation,

---

[3] Rule 137 provides in pertinent part:

"Linemen's work shall consist of the building, repairing and maintaining of pole lines and supports for service wires and cables; . . . all outside wiring in yards, and other work properly recognized as linemen's work not provided for in Rule 136."

would have more validity if management had actually assigned the task in question to carrier-employed Electricians rather than to outsiders." The opinion continues:

> "Assuming that, pursuant to the two applicable agreements and past practice, the work had been given to electricians, there might well be grounds for arguing that the signalmen's agreement had not been abridged. But this is not the situation confronting us. Here, the work was not given to employees of either group who might have laid claim to it. While no complaint was filed by the electricians, the signalmen did protest. There is good reason, therefore, to uphold their claim." (R. Appendix I, p. 4a.)

The award requires respondent to pay three signalmen wages for three hours of work (R. Appendix I, page 6a).

Petitioner instituted enforcement proceedings in the District Court in January 1965, pursuant to Section 3, First (p) of the Railway Labor Act, 45 U.S.C. § 153, First (p). That court accepted the Board's findings that respondent had violated the collective bargaining agreement, but limited recovery in each case to nominal damages of one dollar and the costs of the action because none of the complaining signalmen had been deprived of work due to the violations, and fixed "reasonable attorneys' fees" at $25.00 for each case (R. Appendix I, pp. 14a-17a; R. Appendix III, pp. 13a-15a).

On appeal by petitioner[4] the court below held that the District Court had erred in awarding only nominal damages and attorneys' fees, but vacated the District

[4] Cross-appeals by respondent were abandoned prior to oral argument.

Court's judgment and ordered the cases remanded to the Board for proceedings in accordance with this Court's decision in *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157. In its opinion on petitions for rehearing, the court acknowledged the possible merit of the Brotherhood's contention that the original awards had fully resolved the entire disputes, but held that the Board "is the appropriate forum in which the petitioner should seek clarification of the award. The Board should have the opportunity to reconsider and amplify the awards in light of *Transportation-Communication Employees Union* v. *Union Pacific R.R., supra,* which was not decided when the awards were made" (Pet. p. 35).

REASONS FOR DENYING THE WRIT

In *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, this Court held, as petitioner has accurately stated, that when a dispute over work assignments arises—as when two or more unions claim the right to perform a job which existed at the time their collective bargaining contract with the employer were made, or when two unions claim the right to perform a new job created by technological developments—the "Adjustment Board should resolve such entire work assignments dispute, giving notice to the other union, and whether or not the other union appears, should resolve the dispute upon consideration of all the union contracts involved in the dispute" (Pet. p. 12).

Both of the disputes involved in the present proceeding were decided by the Board before that decision was announced. The court below, reviewing the record of the Board proceedings, could not satisfy itself that the Board had resolved the "entire work assignment

dispute" in either case. The petition challenges the Court of Appeals' evaluation of the Board's actions, but it fails to present any substantial reason why, in case of serious doubt, it is not appropriate to require the Board to reexamine its decisions in the light of an authoritative intervening decision which clarified the Board's responsibility and modified its prior practices. That judicial resolution of such doubts is inappropriate is evidenced by the records in these cases.

1. In the *High Point* case the Court is asked to decide, on the facts, whether another union, the International Brotherhood of Electrical Workers, is "involved" in the dispute. But, as the court below wrote, "the Board, itself, recognized an uncertainty as to which union could assert a right to perform the disputed work or whether, by virtue of the collective agreements and past practice, Southern could unilaterally assign the work to either union, but not to an outsider" (Pet., p. 28). Whether the Electricians have a proper claim to compensation for the improper contracting out, or whether such a claim is now barred by time, are questions which cannot be answered on the basis of the incomplete record compiled prior to the *Transportation-Communication* decision. Moreover, these questions are peculiarly within the special domain of the Board, and for the court below to have undertaken to decide them would have been directly contrary to this Court's decision in *Gunther* v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257.[5]

[5] Petitioner's suggestion that the High Point dispute is directly controlled by Gunther (Pet. p. 14) presupposes that the Board found that the International Brotherhood of Electrical Workers is not "involved" in the dispute. But the very reason for the remand was the absence of any indication that the Board had actually made such a factual determination.

2. In the *Spartanburg* case, as in the *Transportation-Communication* case, the Board directed the carrier to assign work to petitioner's members rather than to the Shop Craft union to which respondent had assigned it. As in that case, the Shop Craft union had filed a "response" with the Board. The response does not appear in the record, but the court below assumed that it was in the form used in the *Transportation-Communication* case (see 385 U.S. at 159, n. 2), reserving the right to institute separate proceedings if the Board's decision adversely affected its members' jobs (Pet. p. 21, n. 3). There is nothing in the Board's conclusion that since the response was filed, "the question as to the necessity for giving notice is moot" (R. Appendix III, p. 3a), which warrants the conclusion that the Board was intending to decide "the entire work assignment dispute"; indeed, there is no reason to believe that the Board did not accept the reservation of rights by the Shop Craft union, just as it had done in the *Transportation-Communication* case. In any event, it would clearly have been wrong for the court below to enter the exclusive domain of the Board to hold, as this Court is now asked to do, that a "response," the text of which is unknown, satisfied the requirements of the Act that the Board had resolved the entire dispute.

CONCLUSION

The issues which this Court is asked to decide in these cases—the degree of involvement of the Electricians in the *High Point* case, and the significance of the "response" of the Shop Craft union in the *Spartanburg* case—are peculiarly within the exclusive domain of the Railroad Adjustment Board, and were properly remanded to that Board for its consideration

in the light of the intervening decisions of this Court. They are issues, moreover, which are limited in significance to these particular disputes. The petition for certiorari should be denied.

Respectfully submitted,

CHARLES A. HORSKY
701 Union Trust Building
Washington, D. C. 20005

L. P. MCLENDON, JR.
440 West Market Street
Greensboro, North Carolina